Supreme Court, U.S.
FILED
FEB 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

vs.

SYLVESTER HARRIS,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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February 28, 1980

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A R G U M E N T

INTRODUCTION

The image presented by the Petitioner in his statement of the case ignores the gravamen of Respondent's complaint, i.e. that Petitioner, under the pretense of acting as a county judge, denied Respondent equal protection of the law by publicly and privately, through correspondence and use of the media, attempting to have Respondent terminated from employment and despised in the community because of Respondent's race. The evidence of the racial discrimination of the Petitioner was described by the Seventh Circuit in a footnote when it stated:

> For sake of brevity we will not summarize the copious evidence as to defendant's racial motivation. Since it was overwhelming, defendant

does not even contend otherwise in his reply brief . . . (App. 4).

Petitioner would like to present an image by his statement of the case that is at variance with the record, the jury verdict, the trial court's decision and the opinion of the Circuit Court. The jury found, the trial court confirmed and the Appeals Court affirmed that the Petitioner's racially motivated conduct, while he functioned under the pretense of his judgeship, severely injured the Respondent.

> The complaint alleges and the proof evidently persuaded the jury that the defendant intentionally acted with racial motivation to deprive the plaintiff of equal protection of the laws, thereby inflicting employment, reputational and emotional injuries on the plaintiff. (App.23).

Some few examples from the record set forth the type of remarks which the judge directed to Respondent's superior officers prior to Petitioner's effort to have Respondent removed from the police force.

In 1973 the Petitioner asked Harris' superior officer, "When are you going to can that black bastard?" (T 102). Another time he yelled, "For Christ's sake, Captain, when are you going to get rid of that black bastard?" (T 102). On yet another occasion the Petitioner referred to Respondent as "that goddamned nigger" (T 104). The Petitioner told another officer, "The Police Department would be better off without the nigger." (T 50-51). He also suggested "sending black paint to Harris' lawyer and friends to enable themselves to be black like Harris" (T 53).

The Seventh Circuit recited the allegations of the Complaint in its decision. (App. 2-5). These allegations substantially set forth in bare-bones form the proof submitted by Respondent. Petitioner's statement of facts does not represent the proof offered. It does not treat the evidence most favorable to Respondent, but instead distorts and misstates facts in a web-spinning effort to bolster its position in the case. A complete exposition of the record may be gleaned from the opinions of the trial judge and appellate court rather than from Petitioner's stilted presentation.

REASONS FOR DENYING WRIT

Petitioner's issues do not set forth any special and important reasons why this Court should grant a writ of certiorari. When measured against the criteria set forth in Sup. Ct. R. 19, Petitioner is found lacking in all respects.

The decision of the Appeals Court is not at variance with any ruling of this Court. There is no federal question which should be decided by this Court. Quite the contrary, the decision of the Court of Appeals is in complete accord with the latest decisions of this Court in the area of judicial immunity. Finally, he presents no conflict between this opinion and that of other Circuit Courts of Appeal.

I.

JUDICIAL IMMUNITY

As recently as 1978 this Court rendered the latest in a long line of decisions clarifying the doctrine of judicial immunity. The decision in Stump v. Sparkman, 435 U.S. 349 (1978) set down specific guidelines which are to be considered when one is immune. This Court ruled that a judge is immune from monetary damages for acts which are judicial. This decision was extremely helpful to the Court of Appeals because for the first time lower courts were given specific guidelines for determining whether an act was judicial. The guidelines which characterize an act as judicial and therefore providing monetary immunity were:

> . . . whether it is a function normally performed by a Judge and to the expectation of the parties . . . Id. at 362.

The Seventh Circuit followed this decision in both letter and spirit.

> . . . The trial judge properly applied the rule of Stump v. Sparkman, 435 U.S. 349, in holding that the acts perpetrated outside of Judge Harvey's courtroom and not then a part of his

judicial functions were undertaken in the "absence of all jurisdiction." These acts involved the defendant's repeated communications to the press and to city officials over the course of more than a year. These communications were critical of plaintiff and called for action to be taken against him. Many of them were made while plaintiff was awaiting trial on the criminal charges stemming from the John Doe proceeding. Such acts were not judicial because they were not functions normally performed by a judge, and were not "to the expectations of the parties" in that as to these acts the parties did not deal with him in his judicial capacity. 435 U.S. at 362. Accordingly, the trial judge instructed the jury that although damages could not be assessed against Judge Harvey for conducting the John Doe proceedings, he could be held liable for his extra-judicial acts. Since no liability was imposed where Judge Harvey enjoyed judicial immunity, no error was committed on that score. (App. 8).

Petitioner is unable to cite any authority for its proposition that the Court of Appeals erred in this respect. The only case cited is a decision of this Court in a criminal case ruling on a constitutional privilege, U.S. v. Helstoski, —U.S.—, 99 S. Ct. 2432 (1979). The instant case does not revolve upon a constitutional or criminal matter. To that extent Helstoski is neither persuasive nor controlling, but is readily distinguishable.

II.

COLOR OF LAW

In its opinion, the Court of Appeals noted that Counsel for the Petitioner agreed during oral argument that Petitioner was acting under color of law. Now he urges this Court to grant the writ because the Appeals Court agreed with his position.

> Defendant's counsel conceded at oral argument that a judge could act under color of law and yet in the absence of all jurisdiction. Counsel for the Voluntary Association of Trial Judges of Wisconsin, appearing as "amicus curiae," conceded that Judge Harvey was acting under color of law. (App. 12).

It is of no little interest to note that the attorney referred to in the above footnote as counsel for "amicus" is none other than Mr. Sundquist who now appears with Mr. Capwell as attorney for Petitioner.

The trial court sets forth some of the actions of the Petitioner which bring his actions under color of law.

> I was convinced at trial and remain convinced as a matter of law that the defendant acted under the pretense of his standing as a county judge. No reasonable juror, in my opinion, could find otherwise. Letters were written on offical stationery. Press releases were disseminated by the defendant, identified as a county judge, through the media. The defendant brought to bear his influence as county judge on those to whom he wrote and spoke. When the defendant Judge Harvey urged the discharge of Lieutenant Harris with racial overtones in out-of-court conversations with Captain Pavkovich and Assistant Chief Hagopian, he was acting as a functionary of the state in at least as high a degree as the off-duty policeman in Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977). (App. 26).

III.

FIRST AMENDMENT

An examination of Petitioner's responsive pleadings and trial transcript will reveal no allegations of a defense based upon first amendment rights. The Petitioner raised this question for the first time in motions after verdict. (App. 22).

Petitioner seeks protection under the free speech clause by characterizing this action as one sounding in defamation.

He ignores the pleadings, the trial court, and the Appeals Court which all represent that this case is one of denial of equal protection. The trial court stated:

> The theory upon which the plaintiff proceeded to trial did not include a claim for defamation. The plaintiff's action, narrowed by the decision and order partially granting the defendant's motion for partial summary judgment, sought damages for a violation of his right to equal protection of the law as guaranteed by the Fourteenth Amendment. The letters which were written by the defendant to various Racine officials and the press releases he prepared and disseminated admittedly involve speech, but that does not end the matter. As the Supreme Court recently stated:
>
> > [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed. Ohralik v. Ohio State Bar Association, 46 U.S.L.W. 4511, 4514 (May 30, 1978), *quoting* Giboney v. Empire Storage & Ice Co., 333 U.S. 490, 502 (1949). (App. 23).

In affirming this decision, the Seventh Circuit held:

However, as the district court pointed out, plaintiff's claim was not for defamation but for an intentional deprivation of equal protection of the laws. (App. 26-27). The fact that this deprivation was accomplished in part through speech does not allow the defendant automatically to invoke the protection of the First Amendment. The jury's findings that defendant's actions were not only racially motivated but were of an action-intended-to-injure quality establish that they were neither fair comment nor the type of speech that is protected by the First Amendment. (App.14).

IV.

EQUAL PROTECTION

Petitioner also argues that Respondent has not been deprived of any right, privilege or immunity under federal law. The Court of Appeals relied upon Adickes v. Kress & Co., 398 U.S. 144 (1970), for the proposition that one has a constitutional right to be free from racial discrimination. The jury found that Petitioner was racially motivated in his actions toward Respondent and this racial motivation was a denial of equal protection. This right to be free from racial discrimination was denied Respondent by Petitioner while Petitioner was acting under pretense of his judgeship. The Petitioner's actions severely injured Respondent in work related activities, his reputation within the community and the police department. The trial Judge wrote:

> The evidence demonstrated that the plaintiff's chances for further advances in employment were significantly diminished; that the plaintiff's skin broke out and that he could not sleep; and that his reputation professionally and socially was impaired. No loss of income occurred since the plaintiff's suspension from the police force was with pay. Such injuries are clearly compensable. Carey v. Piphus, —U.S.—(1978). (App. 31).

C O N C L U S I O N

Petitioner presents no reason under Sup. Ct. R. 19 why his petition should be granted. There are no decisions from other courts of appeals which are at variance with this decision. This decision is in conformity with this court's holdings on judicial immunity.

In conclusion, Respondent submits that this case and decision are extraordinary only in the nature and extent of the abuse bestowed upon the Respondent and, therefore, requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Attorney for Respondent